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No. 01-1640

In The
Supreme Court of the United States

SHASTA COUNTY, a public entity; BRAD McDANNOLD, an individual; and D. COMPOMIZZO, an individual,

Petitioners,

v.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

B.C. BARMANN, SR., County Counsel
County of Kern
JAMES H. THEBEAU, Deputy*
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
Telephone: (661) 868-3814

Attorneys for Amicus Curiae California State Association of Counties

**Counsel of Record*

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QUESTIONS PRESENTED

1. Does *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) require that, in order for a California county to be subject to direct liability for a sheriff's policy or conduct, the county, through its governing body, must be able under state law to control or correct the policy or conduct at issue? If so, did the Ninth Circuit err in holding that, despite a sheriff's constitutionally and statutorily designated independence from a county's governing body, the board of supervisors, in the area of criminal investigations, the Shasta County Sheriff acts for Shasta County when investigating crime?

2. Did the Ninth Circuit err in its reliance upon a *respondeat superior* statute in holding that, in the area of criminal investigations, official capacity suits against the sheriff under 42 U.S.C. § 1983 are suits against the county?

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STATEMENT OF *AMICUS CURIAE* INTEREST

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state.[1]

In *Brewster v. County of Shasta*, 275 F.3d 803 (9th Cir. 2001), the Ninth Circuit Court of Appeals published a decision which holds that California sheriffs act on behalf of California counties in the area of criminal investigations. The Litigation Overview Committee of CSAC, which monitors litigation of concern to counties statewide, has determined that this case will have a dramatic and adverse affect on all California counties. California counties are routinely sued under *Monell v. Dept. of Soc. Serv. of City of New York,* 436 U.S. 658, 98 S.Ct. 2018 (1978), for claims involving sheriffs' alleged deficient policies or practices in the area of criminal investigations. *Brewster* subjects counties to *Monell* liability for sheriffs' official policies or practices in the area of criminal investigations despite the fact that counties are constitutionally and statutorily powerless to make, execute, control or correct those policies or practices. Further, *Brewster*'s reasoning from a *respondeat superior* statute to county liability under 42 U.S.C. § 1983 portends a dramatic expansion of county liability beyond that which is intended or allowed by *Monell*.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

All parties have consented in writing to the filing of this brief by *Amicus Curiae*, California State Association of Counties.

REASONS FOR GRANTING CERTIORARI

Amicus Curiae CSAC asks this Court to make explicit that which is implied in the analysis undertaken in *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 117 S.Ct. 1734 (1997): A conclusion that a government official's particular function or conduct is exercised for a local government entity for the purpose of imposing direct liability pursuant to 42 U.S.C. § 1983, requires a finding that the local government entity's governing body is authorized by state law to make, control or alter policy governing the particular function or conduct at issue.

The Ninth Circuit's departure in *Brewster* from the implicit requirement of *Monell* and *McMillian* that public entities incur liability only for policies or practices that they, through their governing bodies, can control, has drastic, far-reaching consequences for the litigation of all claims of *Monell* liability in the Ninth Circuit. First, *Brewster* effectively subjects California counties to direct liability for a sheriff's constitutionally deficient policies or conduct despite the inability of the county to correct the deficient policy or conduct. *Brewster* is likely to create a risk management crisis for California counties (and other public entities if *Brewster's* holding is extended) because counties are powerless to avoid liability. Second, by ignoring state law's treatment of who controls the precise function at issue, and by its heavy and misplaced reliance upon a *respondeat superior* statute, the Ninth Circuit has

effectively enacted vicarious liability of counties for all deficient sheriffs' policies.

The linchpin of the Ninth Circuit's decision in *Brewster* is the theory that the sheriff's constitutionally and statutorily designated functional independence from the county in the area of criminal investigations does not mean he does not act for the county when investigating crime. *Brewster*, *supra*, 275 F.3d at 809-10. By contrast, in *McMillian* this Court identified the functional independence of the Alabama sheriff, the county's lack of "powers and duties" in the area of criminal law enforcement and the existence of control by the governor and attorney general as the most important factors in the determination that Alabama sheriffs do not act for Alabama counties. 520 U.S. at 790-91. *Brewster* subjects a California county to direct liability for a sheriff's constitutionally deficient policy or conduct in the area of criminal investigations despite the inability of the county to direct the sheriff to correct the deficient policy or conduct. *Brewster* thereby violates the teaching of *Monell* that public entity liability under 42 U.S.C. § 1983 may not be based on *respondeat superior* principles, but rather must be based on a showing that the public entity's policy choices were the "moving force" of the constitutional violation.

If *Brewster* is not overturned, California counties face repeated claims and judgments for the same deficient law enforcement policies or conduct in the area of criminal investigations because counties are legally powerless to correct the deficient policies or conduct. Further, by basing its decision on a *respondeat superior* statute rather than an analysis of whether state law gives counties powers or duties over the function at issue, the Ninth Circuit has effectively enacted county *Monell* liability regardless of the

function at issue. Unless *Brewster* is overturned, California counties face an expansion of direct liability under 42 U.S.C. § 1983 far beyond that which is warranted under *Monell*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *McMillian*, this Court considered whether Alabama sheriffs act for Alabama counties when acting in their law enforcement capacity, so as to subject counties to municipal liability under 42 U.S.C. § 1983 for the constitutional torts of the sheriff. The Court concluded that the weight of state constitutional and statutory provisions governing the sheriff's relationship with the state compelled the conclusion "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." 520 U.S. at 793.

In accordance with its prior holdings that the identification of final policymaking authority for purposes of *Monell* liability "is a question of state law," the Supreme Court held state law must control the determination of which entity the sheriff represents when performing his or her law enforcement duties. *Id.* at 786. The Supreme Court identified the sheriff's functional independence from the county, the defendant county's inability under state law to control the sheriff in the exercise of his law enforcement functions, and the existence of control by the state's governor and attorney general, as the most important factors in holding that the customs or policies of the sheriff were not attributable to the county. *Id.* at 790-91. While the issue of control was paramount in the *McMillian* analysis, this Court has not yet described a defendant

public entity's ability to exercise control over particular conduct by an official as an essential element of a finding that the public entity is subject to *Monell* liability for the official's conduct.

In *Brewster,* the Ninth Circuit holds that, despite the fact that California law establishes a California sheriff "functions independently" from the county in the area of criminal investigations, California sheriffs act for the counties when investigating crime. *Brewster*, 275 F.3d at 809-10. The effect of the *Brewster* decision is to impose direct *Monell* liability on California counties for deficient policies in the area of criminal investigations despite the complete powerlessness of counties, through their governing bodies, to correct or remedy the deficient policies. The Ninth Circuit was able to reach this result only by disregarding the implicit instruction of *Monell* and *McMillian* that public entities should be liable under 42 U.S.C. § 1983 only when they have the power to remedy the unlawful conduct.

The Ninth Circuit's heavy reliance on California's *respondeat superior* statute for its holding is misplaced because it depends on a misapplication of the analysis in *McMillian*. In *McMillian,* this Court observed that because suits against Alabama sheriffs in a law enforcement capacity were deemed suits against the state, Alabama counties did not have *respondeat superior* liability for a sheriff's law enforcement conduct. 520 U.S. at p. 789. The Ninth Circuit has turned the *McMillian* analysis on its head, holding that a county's obligation to indemnify its employees under California Government Code § 815.2 requires a finding that official capacity suits against the sheriff are suits against the counties. The Ninth Circuit's reliance upon California Government Code § 815.2, to the

exclusion of the implicit requirement of *McMillian* for a finding that a public entity is able under state law to exercise control over the function at issue, portends an expansion of *Monell* liability along the lines of *respondeat superior* liability.

LEGAL ARGUMENT

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT, DESPITE THE CONSTITUTIONALLY AND STATUTORILY DESIGNATED INDEPENDENCE OF SHERIFFS FROM COUNTIES IN THE AREA OF CRIMINAL INVESTIGATIONS, THE SHASTA COUNTY SHERIFF ACTS FOR SHASTA COUNTY WHEN INVESTIGATING CRIME.

A. *Brewster* conflicts with an implicit requirement of *Monell* and *McMillian* that, in order for a public entity to be subject to liability pursuant to 42 U.S.C. § 1983 for a sheriff's policy or conduct, the county's governing body must have the ability to correct the deficient policy or conduct.

In *Monell,* this Court held that municipal liability pursuant to § 1983 could not be based on any form of vicarious liability. 436 U.S. at 691. This holding was based upon legislative history indicating that, in enacting § 1983, Congress sought to impose municipal liability only when the municipality was empowered to prevent unconstitutional conduct. *Id.* at 693. Thus, only when "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is liable under § 1983." *Id.* at 691.

This requirement seems to preclude a finding of public entity liability when the public entity's governing body lacks authority to correct the constitutionally deficient policy or custom.

In *McMillian,* the Court found "most importantly," that Alabama sheriffs were given complete authority by statute to enforce the criminal law in their jurisdictions, that Alabama counties have no powers or duties in law enforcement and that the governor and attorney general do have this control. 520 U.S. at 790-91. Thus, the "governing body" of Alabama counties, the county commission, "cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of crime." The Court continued, "[w]hile the county commission thus has no direct control over how the sheriff fulfills his law enforcement duty, the governor and attorney general do have this kind of control." *Id.* at 790-91. When analyzing other provisions of Alabama law, for example the county's budgetary authority and the payment of the sheriff's salary, the Court focused on whether the provisions translated into direct county control over the sheriff's law enforcement function. *Id.* at 791-92. The Court's analysis therefore implies that the county's ability to exercise control over the law enforcement function is essential to a finding that the sheriff acts for the county in a law enforcement capacity.

Despite *McMillian's* emphasis on the issue of a county's control over a particular function or conduct, the Ninth Circuit's decision in *Brewster* contains no reference whatsoever to the discussion of this issue in *McMillian.* Consistent with its disregard of the analytical framework of *McMillian*, the Ninth Circuit completely failed to analyze whether state law empowers California counties to control sheriffs when investigating crime. Significantly,

the failure to undertake this analysis and to make a finding as to who controls the function at issue is a violation of the Ninth Circuit's own pre-*McMillian* precedent. In *Eggar v. City of Livingston,* 40 F.3d 312 (9th Cir. 1994), wherein the plaintiff sued over a city judge's furtherance of the city's alleged policy of refusing to provide counsel to indigents, the Ninth Circuit held that *"[a] municipality cannot be liable for [official] conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality."* (Emphasis added.) *Id.* at 316.

In *Brewster,* the Ninth Circuit repudiated as irrelevant California law establishing that California counties cannot control sheriffs in their investigatory function. The court expressly rejected the application of California Government Code § 25303, which states that counties cannot control sheriffs in their "independent and constitutionally and statutorily designated investigative and prosecutorial functions." *Brewster*, 275 F.3d at 809-10. The Ninth Circuit reasoned that § 25303 has no bearing on the issue of whether the sheriff acts for the county because it merely expresses the separation of powers doctrine. *Id.* at 810. This reasoning is fallacious because it begs the question of why counties should be liable for a sheriff's investigatory conduct if the counties are powerless to correct or remedy the conduct.

In rejecting the application of § 25303, the Ninth Circuit held that the sheriff's functional independence from the county "does not mean he does not act *for* the county." (Emphasis in original.) *Id.* at 810. The Ninth Circuit thereby completely unhinged its analysis from the analysis required to be undertaken by *McMillian*. Further, the result reached in *Brewster* would not have been

possible but for the Ninth Circuit's conclusion that a sheriff's constitutionally and statutorily designated independence in the area of criminal investigations is not relevant to a finding that the sheriff acts for the county when investigating crime.

B. The Ninth Circuit ignored or misconstrued critical provisions of California law which establish that, while California counties have no control over how a sheriff investigates crime, the California Attorney General does have this control.

The *Brewster* decision contains no discussion of California law establishing that California counties are powerless to direct the sheriff while conducting criminal investigations. The *Brewster* decision contains only a passing reference to, and no analysis of, *Pitts v. County of Kern*, 17 Cal.4th 340, 358-59, 70 Cal.Rptr.2d 823 (1998), in which the California Supreme Court held that, while the governing bodies of California counties lack powers or duties in the investigation, detection and prosecution of crime, the Attorney General does have this control. Yet, the analysis undertaken in *Pitts* obviously merits a prominent role in the analytic framework of *McMillian*. The Ninth Circuit made no reference to the California Attorney General's statutory duty under California Government Code § 12560 to "direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff. . . ." This provision of law obviously merits a prominent role in analyzing whether a sheriff acts for the county when investigating crime.

The Ninth Circuit gave little or no weight to California's constitutional provision that places sheriffs under the

"direct supervision" of the State Attorney General, because the provision gives the Attorney General authority over "other law enforcement officers." *Brewster*, 275 F.3d at 808-9. However, the Ninth Circuit failed to observe that, unlike counties, the Attorney General exercises his supervisory duties subject to the constitutional authority of California cities to constitute, regulate and govern a city police force. *See,* Cal. Const., art. XI, § 5(b)(1).

In *Brewster*, the Ninth Circuit also failed to observe the State Legislature's exclusive authority to define the sheriff's duties. California counties have no inherent powers and may exercise, through the board of supervisors, only those powers expressly granted by the state Constitution or statute. *Hicks v. Board of Supervisors*, 69 Cal.App.3d 228, 242, 138 Cal.Rptr. 101 (1977). The State Legislature is exclusively empowered to provide for a county sheriff. Cal. Const., art. XI, § 1. The power of the State Legislature to provide for a county sheriff includes the exclusive power to define the sheriff's duties: "The Legislature has always had, and still enjoys plenary power to define the sheriff's duties. . . . Because the sheriff, as stated, is a constitutional officer, his duties are of statewide importance, a fact further cemented by the existence of myriad statutes regulating his duties." *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 796, 800, 251 Cal.Rptr. 444 (1988).

The Ninth Circuit relied upon selected portions of the holding in *Dibb v. County of San Diego,* 8 Cal.4th 1200, 1210, 36 Cal.Rptr.2d 55 (1994), that California Government Code § 25303 authorized the creation of a citizens' review board to consider public complaints about the probation and sheriff's departments. *Brewster*, 273 F.3d at 808. However, the Ninth Circuit failed to mention the most

relevant portion of *Dibb*, wherein the California Supreme Court held that the review board must "not interfere . . . with the Attorney General's constitutional responsibility to oversee the sheriff. [citations]." In fact, the Supreme Court noted that the County Board of Supervisors was powerless to "'*direct the manner in which the [sheriff's] duties are performed.*'" *Dibb, supra*, 8 Cal.4th at 1209, n. 4 (emphasis added).

While noting the sheriff's status as an elected official under the state Constitution, the Ninth Circuit completely misconstrued what that means. In *Brewster,* the Ninth Circuit implied that, unlike Alabama sheriffs, the elected status of California sheriffs places California sheriffs outside "the state executive department." *Brewster*, 273 F.3d at 809. To the contrary, the constitutional change requiring the sheriff to be elected was intended to place the sheriff outside the control of local government. *Connolly v. County of Orange*, 1 Cal.4th 1105, 1113, fn. 9, 4 Cal.Rptr.2d 857 (1992) (In the case of any elected official under California Const., art. XI, § 1, a county may not "control, indirectly or directly, the manner in which the duties are performed."). The Ninth Circuit's interpretation makes a mockery of California's constitutional and statutory law providing that the Attorney General has exclusive supervisory authority over the sheriff's law enforcement function.

The Ninth Circuit falsely distinguishes between Alabama's provision for impeachment by the State Supreme Court and California's provision for impeachment by a county grand jury. *Brewster*, 273 F.3d at 808. The Ninth Circuit failed to mention that in California county grand juries are an arm of state government. The grand jury is an arm of the Superior Court and is under the control of the Superior Court. *People v. Superior Court*

(1973 Grand Jury), 13 Cal.3d 430, 438-39, 119 Cal.Rptr. 193 (1975). The Superior Court is, in turn, an arm of the state. *Sacramento and San Joaquin Drainage Dist. v. Superior Court*, 196 Cal. 414, 432 (1925) (superior courts of the State of California "are not local or county courts, but constitute a system of state courts. . . . "); *County of Sonoma v. Workers Comp. Appeals Bd.*, 222 Cal.App.3d 1133, 1141, 272 Cal.Rptr. 297 (1990) (under the state Constitution, the functioning of the courts is a state matter, not a local matter). Thus, the Ninth Circuit sidestepped the obvious fact that, while California's statutory provisions for removal of a sheriff are not identical to Alabama's, they are, like Alabama's, constitutionally and statutorily state-based and not a matter of county concern or control.

The complete lack of county control over the sheriff's investigatory function is abundantly clear from California's constitutional, statutory and case law. Neither the description of the sheriff's title as a county officer, nor the fact that he is elected by county voters, nor the fact he is paid by the county, alters the longstanding treatment of the sheriff, at least when engaged in his investigatory function, as an officer of the state. In *McMillian,* this Court found significant the common law history of the sheriff as an officer or agent of the King, and the continuation of that common law tradition in the United States. *McMillian, supra,* 520 U.S. at 794. In characterizing the plaintiff's argument that the interrelationship between the sheriff and the county required a finding the sheriff be deemed to act on behalf of the county as "simply a disagreement with the ancient understanding of what is meant to be a sheriff," the Court evinced its understanding that under common law, a sheriff is a state officer while

carrying out his duty to keep the peace. *Id.* at 795. Significantly, the common law of England, insofar as it is not repugnant to or inconsistent with the laws of the state, is the rule of decision in all California courts. *See,* California Civil Code § 22.2.

II. THE NINTH CIRCUIT ERRED IN RELYING UPON A VICARIOUS LIABILITY STATUTE TO DETERMINE WHETHER SHERIFFS ACT FOR COUNTIES WHEN PERFORMING THEIR INVESTIGATORY FUNCTION.

In holding that sheriffs act for the counties when investigating crime, the Ninth Circuit places heavy reliance on Government Code § 815.2's requirement that public entities indemnify their employees. *Brewster,* 273 F.3d at 807, 808. This reliance is misplaced because it is based on a distortion of *McMillian*'s analysis and because it has no place in an analysis of whether an official acts for a public entity so as to subject the public entity to direct liability under 42 U.S.C. § 1983.

A. The Ninth Circuit's reliance on Government Code § 815.2 is based on a misapplication of *McMillian*.

In *McMillian,* this Court found it critical that the Alabama Supreme Court held that, because "sheriffs are state officers . . . tort claims brought against sheriffs based on their official acts therefore constitute suits against the States, not suits against the sheriff's county." 520 U.S. at 789. Thus, it is clear the Alabama courts reasoned *from* the sheriff's capacity as a state law enforcement official *to* the county's lack of *respondeat superior* liability for the

sheriff's official law enforcement conduct. In *Brewster*, the Ninth Circuit reverses the reasoning of the Alabama courts and this Court in *McMillian*. The Ninth Circuit reasons from the existence of Government Code § 815.2, which requires all public entities, including the state, to indemnify their employees, that counties are therefore liable for official capacity suits against the sheriff. The logic of the *McMillian* analysis is thereby turned completely on its head.

The Ninth Circuit's misapplication of *McMillian* and resulting reliance on Government Code § 815.2 may be due to a failure to distinguish official capacity suits against the sheriff, who is not a county employee, from individual capacity suits against sheriff deputies for their constitutional torts. Pursuant to the decisions in *Pitts v. County of Kern*, *supra*, 17 Cal.4th 340, and *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), it is now settled that, under California law, counties cannot have *respondeat superior* liability for official capacity suits based on an exercise of the sheriff's law enforcement function.

B. Principles of *respondeat superior* have no place in an analysis of whether an official acts for a public entity so as to subject the public entity to direct liability under 42 U.S.C. § 1983.

Whether a county is subject to *Monell* liability in a particular area should not be based on whether the county or the state's treasury is impacted. Analysis of *Monell* liability based on who pays a judgment is backwards because it cannot be determined whose treasury is properly impacted

until it is determined which entity is subject to liability under 42 U.S.C. § 1983.

A county's protection from direct liability under 42 U.S.C. § 1983 derives solely from recognition that *Monell* liability will not lie for certain conduct undertaken by a public official on behalf of the state. *See, Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Whether a policymaker acts on behalf of the county or the state is a question to be determined by the function involved, and, most importantly, which entity is authorized under state law to control the policymaker's performance of that function. *See, City of St. Louis v. Praprotnik,* 485 U.S. 112, 123-24, 108 S.Ct. 915 (1988) (reaffirming that "the identification of policymaking officials *is not a question of federal law*") (emphasis added). If an analysis of whose treasury is impacted is used to determine which entity a policymaker represents, the analysis is certain to beg the question of whether the challenged action was "taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the [public entity's] business." *Id.* at 123.

The Ninth Circuit's reasoning from a vicarious liability statute to the direct liability of counties under *Monell* for the official acts of the sheriff is circular and does not answer the question of which entity, the county or the state, exercises control over the sheriff's investigatory function. Further, reliance on *respondeat superior* principles will inevitably lead to the result that counties are always liable for the acts of the sheriff, regardless of the function involved or whether the counties control that function.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully urges the Court to grant the Petition for Writ of Certiorari and to hold that 1) a conclusion that a government official exercises a particular function for a local government entity for the purpose of imposing direct liability pursuant to 42 U.S.C. § 1983, requires a finding that the local government entity's governing body is authorized by state law to make, control or alter policy governing the particular function at issue and 2) the Ninth Circuit erred in holding that, despite the sheriff's functional independence from the county's governing body, the board of supervisors, in the area of criminal investigations, the Shasta County Sheriff acts for Shasta County when investigating crime.

Respectfully submitted,

B.C. BARMANN, SR., County Counsel
County of Kern

JAMES H. THEBEAU, Deputy*

Attorneys for Amicus Curiae
California State Association of Counties

**Counsel of Record*